No. 82.

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JAMES H. McKENNEY,
Clerk.

Brf. of Dudley, Pettit & Conner for P. E.

Supreme Court

OF THE UNITED STATES

Filed Nov. 8, 1900.

October Term, 1899.

NO. ~~320~~ 82

ANTONE MARKS, Plaintiff in Error.

vs.

J. M. SHOUP, Defendant in Error.

Error to the District Court in and For the District of Alaska

Brief of Plaintiff in Error

W. E. CREWS and J. H. COBB,
Counsel for Plaintiff in Error

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IN THE

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Brief of Plaintiff in Error

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Counsel for Plaintiff in Error

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

This was a suit at law for damages for the sum of $6000.00, brought by Antone Marks, plaintiff in error, against J. M. Shoup, Marshal of Alaska, defendant in

error, alleged to have been caused by the taking from plaintiff's possession and conversion of a certain stock of goods, wares and merchandise, the property of plaintiff, which taking was alleged to have been done by the defendant under color of his office by and through his deputy. (Printed record p. 1 and 2).

Defendant answered, admitting the taking, and plead a justification under two certain writs of attachment issued out of the District Court of Alaska against one Joe Levy, one in the case of Powers Dry Goods Company vs. Joe Levy, and the other The West Coast Grocery Co. vs. Joe Levy; that the goods sued for were transferred to third persons under whom the plaintiff claims, and said transfers were in fraud of creditors and were void, and that on the 16th day of May, 1898, defendant as marshal levied upon said goods and ever since said time and now hold the same thereunder. (Printed Record pp. 3-5).

Plaintiff replied that he had bought the goods from third persons for a valuable consideration, denied all fraud, and further plead that during all the time from prior to the commencement of the actions mentioned in defendant's answer until and at the time of the taking, he was in the actual and exclusive possession of the goods, and denied that defendant ever made any levy whatevsr upon said goods. (Printed R. 6 and 7).

Defendant filed a supplemental answer at the trial setting up that the attachments had merged in judgments which had been satisfied out of the proceeds of a sale of the goods. (Printed R. 7 and 8).

The case was tried before a jury and resulted in a verdict for defendant. (Printed R. 9).

Motion for a new trial was made (Priuted R. 9-11)

and overruled (Printed Record 12) and judgment entered for defendant (R. 12).

The Bill of Exceptions was settled, allowed and filed in time (R. 13-21), a writ of error sued out, (R. 22-25) assignments of error filed, (R. 25-30) and the cause is now here presented for correction and revision.

The facts so far as material to the questions to be presented are as follows:

At the time of the taking complained of the plaintiff was in the actual, exclusive possession of the goods sued for, which were in a store building in the town of Juneau. The marshal, under the writs of attachment against Joe Levy, mentioned in his answer, entered the store, took the key from plaintiff's pocket, put him out of the house and locked the door—in other words forcibly dispossessed plaintiff of the goods (R. 13).

The above facts are undisputed, the testimony being all one way, and they are also admitted in the pleadings.

The goods originally belonged to Joe Levy, who sold them to one Levine, by verbal sale and actual delivery, and as a part of the consideration Levine assumed to pay a debt due to Plaintiff Marks. Levine then sold and delivered to one Kendall, and Kendall assumed to pay the same debt. Kendall sold and delivered to plaintiff; and there was evidence tending to show that all these transfers were in fraud of creditors.

The errors assigned relate to the rulings of the Court upon the admission of evidence and instructions to the jury, and we will briefly state the nature of the

questions raised and to be presented before taking up the assignments themselves. These questions are:

1st. Is a writ of attachment under the laws of Oregon in force in Alaska void because the affidavit therefor fails to show the amount of the indebtedness sued for?

2d. Is a levy of such writ void when the return of the marshal shows it was made solely by posting a copy of the writ on the door of the store in which the goods claimed to have been levied upon were situated?

3d. Under the laws of Oregon in force in Alaska, is a levy on personal property made by actual seizure and taking possession thereof by the marshal, where such property is in the hands of a third person claiming it, void?

4th. If either the writ, or the levy under it, is void can the marshal justify thereunder?

5th. Is a sale and delivery of goods not evidenced by a writing, valid in law, and sufficient to pass title, when as a part consideration therefor the buyer assumed to pay a debt of the seller owing to some third person?

All these questions (except the 4th, which became immaterial in view of the ruling on the others) were in effect answered in the negative, by the trial court.

The *First and Second Assignments* relate to the same error, and will be considered together. (R. 25-29)

These two assignments question the correctness of the rulings of the Court in admitting in evidence to the jury the judgment rolls in the cases of Powers Dry

Goods Co. vs. Joe Levy, and West Coast Grocery Co. vs. Joe Levy. These two judgment rolls were identical except as to names of plaintiffs and amounts sued for. The bill of exceptions (R. 14-19) shows that both these suits were ordinary actions for debt and attachment.

Summons was issued and not served [see R. 14 and 17], and substituted service of summons was afterward obtained by publication (see R. 16 and 18). The affidavits for writs of attachment wholly failed to make any mention of the amount of indebtedness claimed. (See R. 14 and 17).

The returns upon the writs of attachment were as follows: "I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within named defendant, towit: All the goods, wares and merchandise situated in the one story building one door south of B. M. Behrends' bank on Seward street, between Second and Third streets, in the town of Juneau, District of Alaska, by posting a copy of said writ of attachment on the front door of said building; also 11 cases of boots and shoes consigned to the within named defendant Joseph Levy, situated in the warehouse of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Company, and have all the above described personal property of the within named defendant now in my possession.

Dated at Juneau, Alaska, May 14th, 1988.

[Signed] JAMES M. SHOUP,

U. S. Marshal for the District of Alaska.

By WM. D. Grant, Deputy."

(See R. p. 15 and 18) (also p. 26 and 28).

(The 11 cases of boots and shoes were not involved in this suit).

Judgments by default were taken in these two cases against Levy, based upon the substituted service of summons [R. 16 and 18] and executions were issued and satisfied out of the goods in controversy. [R. 16 and 19]

Plaintiff objected to the introduction in evidence of these judgment-rolls,

1st. Because the writ of attachment was void and issued without any jurisdiction in the Court issuing the same, for the reason that the affidavit for attachment failed to state the amount of indebtedness sued for.

2d. Because the levy of said writ of attachment is void for the reason that the return fails to show any such acts as constitute a valid levy, and for the further reason that the goods levied upon as shown by the evidence and admitted by the pleadings were in the possession of the plaintiff Antone Marks and said writ of attachment could only have been levied by leaving a copy thereof and notice of levy with the party in possession of said goods.

3d. Because there being no personal service of the summons upon defendant and no valid or legal levy of the writs of attachment the judgment rendered in said causes were void. [R. 16 and 19]. But the Court overruled the objections and permitted the evidence to go to the jury; to which rulings plaintiff reserved his exceptions, and assigned error.

SUBSIDIARY PROPOSITION OF LAW HEREUNDER.

The Laws of Oregon in force on May 17th, 1884,

were extended to, and became and are the laws of the District of Alaska, except where in conflict with the laws of the United States.

(Act of Congress, May 17, 1884—23 Stat. at Large 24).

FIRST PROPOSITION OF LAW HEREUNDER.

A writ of attachment issued upon an affidavit which wholly fails to specify the amount of the indebtedness claimed, is void.

AUTHORITIES.

"A writ of attachment shall be issued by the clerk " of the Court in which the action is pending, when- " ever the plaintiff or anyone in his behalf shall " make an affidavit showing:

"1—That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter claims) upon a contract" etc.

1 Hill's Code, Oregon, Ed. 1887, § 145, Lsws of Oregon 1876, p. 35.

Drake on Att. (7th Ed.) §§ 87a-89a.

STATEMENT.

The affidavits wholly failed to specify the amount of indebtedness. Tney are set out *verbatim* supra.

SECOND PROPOSITION OF LAW HEREUNDER.

Where there is no jurisdiction over the person of

defendant, and the affidavit for attachment is fatally defective in wholly failing to state some fact prescribed by law as essential to its issuance, then the whole proceeding is *coram non judice* and void.

STATEMENT.

The summons was served by publication. The affidavit for attachment wholly failed to specify the amount of indebtedness claimed, as provided by the statute of Oregon.

AUTHORITIES.

Drake on Att. (7th Ed.) §89.

ARGUENDO.

Counsel for defendant relied in the Court below, and we suppose they will rely here, upon the case of Matthews vs. Densmore, 109 U. S. 216. But we think there is an essential difference in that case and the one at bar. There the defendant in the attachment suit was in court, and not having objected might well be held to have waived the defect. Here the defendant in attachment was not in court. The only jurisdiction the Court could have was over the *res*, and if the affidavit was defective and the writ void, there was no jurisdiction over the *res*, and the whole proceedings were void.

But even if we are wrong in the above contention we are certainly right in the following ones, and the Court should have sustained our objections thereon:

THIRD PROPOSITION OF LAW HEREUNDER.

The levy of a writ of attachment upon goods is void where the return shows that it was made simply by

posting a copy of the writ of attachment on the doors of the store house containing the goods.

STATEMENT.

The return of the marshal shows no other act under the writ, so far as the goods in controversy are concerned, other than the posting of a copy of the writ of attachment on the door of the store house containing the goods. [R. 15 and 18].

AUTHORITIES.

Scheider vs. Sears, 8 Pac. Rep. [Or.,] 843.

FOURTH PROPOSITION OF LAW HEREUNDER.

A levy of a writ of attachment upon personal property in the possession of one other than defendant in the writ, can only be made, under the laws of Oregon, [in force in Alaska] by giving notice of the levy, and delivering a copy of the writ to the person in possession of such property. If made in any other manner it is void.

STATEMENT.

The undisputed facts were that Marks, plaintiff in error, was in possession of the goods [R. 13]. Levy, the defendant in the writs, had left the country. [R. p. 4]. The defendant took the goods from plaintiff's possession by force and violence. (R. 13).

AUTHORITIES.

The statute of Oregon, in force in 1884, and extended to Alaska by act of congress, cited *supra* relating to levies reads as follows:

"The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows: * * *

"2. Personal property, capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody.

"3. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same." * * *

1 Hill's Code Or. (Ed. 1887) § 149, sub. 2 and 3,

Spaulding vs. Kennedy, 6 Or. 208.

Lewis vs. Birdsey. 26 Pac. Rep. (Or.) 623.

Bachellor vs. Richardson, 21 Pac. Rep. (Or.) 392.

Construing this statute, the Supreme Court of Oregon in the case of *Spaulding* vs. Kennedy, 6 Or. 208, decided in 1876, held that where an officer in making a levy of a writ, seized personal property in the hands of a third person, he was a trespasser, and cannot justify under the writ, even though the property belong to the defendant in the writ. When an officer armed with a writ, finds property which he supposes to belong to the defendant in the writ, in the hands of a third person, he has no right to determine the possession except in the manner provided by law. The same ruling is reaffirmed by the Supreme Court of Oregon in the two cases cited from the Pacific Reporter. See also Mickey vs. Stratton 5 Saw 475.

The Third and Fifth assignments of error will be considered together.

THIRD ASSIGNMENT OF ERROR.

"The Court erred in admitting in evidence to the " jury over plaintiff's objections the testimony of O. " H. Adsit, F. Y Schuck and O. J. Kendall, tending " to prove that in the months of April and May, 1898, " Joe Levy was largely indebted to the Powers Dry " Goods Company, the West Coast Grocery Co.. the " Willamette Tent & Awning Co. and others and was " wholly insolvent; and that he transferred the stock " of goods in controversy to one Levine without con- " sideration, and for the purpose of defrauding his " creditors. and Levine transferred the same stock to " O. J. Kendall. and Kendall transferred the same " stock to Antone Marks, all without consideration " and for the purpose of defrauding the creditors of " Joe Levy, and especially the Powers Dry Goods " Company and the West Coast Grocery Co." [R. " 29-30].

FIFTH ASSIGNMENT OF ERROR.

" The Court erred in giving the following instruc- " tions to the jury, towit:

" If you believe and find from the evidence that the " goods in controversy were transferred by Joe Levy " to one Levine without consideration, or for the pur- " pose of hindering, delaying and defrauding the " creditors of the said Joe Levy, and pursuant to the " same purpose, Levine transferred the goods to Ken- " dall, and pursuant to the same design, or with " knowledge or notice thereof Kendall transferred

" them to the plaintiff, Marks, you will find for the " defendant." (R. 30).

STATEMENT.

The bill of exceptions (R. 19 20) shows that when the evidence set out in the Third assignment was offered, plaintiff objected because the writs of attachment, and the levies thereunder, in the cases of the Powers Dry Goods Co. and the West Coast Grocery Co., being void, and there being no attachments and no personal service of summons in said cases the whole proceedings under which the marshal sought to justify were *coram non judice* and void, and the evidence offered was therefore immaterial and irrelevant. The objections were overruled and the testimony admitted and plaintiff saved his exception; and thereupon the Court gave the instructions set out in the Fifth Assignment of Error. (R. 20).

FIRST PROPOSITION OF LAW HEREUNDER.

Where an officer is sued by one person for seizure of goods under a writ against another under whom the plaintiff claims, the officer cannot raise the issue of fraud in the transfer to the plaintiff by the person named as defendant in the writ, unless he first shows a valid writ and a valid levy thereof on such goods; and unless he does so the question of fraud *vel non* is wholly immaterial.

AUTHORITIES.

Bump on Fraudulent Con. p. 453.

Bachellor vs. Richardson, 21 Pac. Rep. 392.

Lewis vs. Birdsey, 26 Pac. Rep. 623.

The issue of fraud should therefore have been entirely withdrawn from the jury.

But the charge contains another fatal error as will appear from a consideration of the

SECOND PROPOSITION OF LAW HEREUNDER.

The title of a vendee of a fraudulent vendee of goods can only be defeated by showing a participation in, or notice of the fraud on the part of the second vendee.

This rule is elementary.

Walker vs. Collins 1 C. C. A. 646. Hinds vs. Keith 6 C. C. A. 233.

The charge complained of authorized the jury to find for defendant, if Levy fraudulently sold to Levine, and Levine fraudulently sold to Kendall and if Kendall with a fraudulent design or knowledge or notice thereof transferred them to plaintiff Marks. In other words the jury could find for defendant though they might believe that plaintiff was an innocent purchaser for a valuable consideration, if they believed that the transfers from Levy to Levine, and from Levine to Kendall were fraudulent, and Kendall was actuated by a fraudulent motive in transferring to Marks, even though Marks did not participate in the fraud and had no notice of it. This charge is in accord with defendant's answer (R. p. 4) which only charged fraud against the transfers made by Levy, and nowhere connects plaintiff therewith; and the issue of fraud should have been withdrawn from the jury entirely.

Wise vs. Jeffries, 2 C. C. A. 43.

SIXTH ASSIGNMENT OF ERROR.

This assignment questions the correctness of the instructions given the jury by the Court wherein the Court charges that the jury must find for the defendant if they find and believe from the evidence, that Levy sold the goods in controversy to Levine, Levine to Kendall and Kendall to plaintiff Marks, and that in each of these first two transfers there was an agreement on the part of the vendee to assume an indebtedness of Levy to Marks as a part of the consideration, unless such agreement was in writing, as an oral agreement to that effect was void. See Record p. 20.

In giving this instruction the learned trial Court evidently had in mind that section of the statute of frauds declaring void an agreement to answer for the debt, etc , of another unless in writing. But a promise to pay the debt of another in consideration of property sold is not a promise to pay the debt of another. It is a promise to pay the promiser's own debt in a particular way. Clark on Contracts, pp. 98-99, and authorities there cited.

The effect of this instruction was the same as a peremptory charge to find for the defendant. Plaintiff might have won on the issue of fraud, notwithstanding the errors of the court. But there was no dispute but that the terms of the transfers as well as the transfers themselves under which plaintiff claimed the goods were all not in writing (see R. p. 14), and when the jury were told that if they found they were not in writing their "verdict must be for the defendant," there was no need for the jury to pass upon any other question.

FOURTH ASSIGNMENT OF ERROR.

This assignment (Record p. 30) complains of the action of the court in refusing the motion of the plaintiff at the conclusion of the whole testimony to give a peremptory instruction for plaintiff (R. p. 20). The grounds of the motion were in effect that the plaintiff's possession and title of the goods were admitted except as met and avoided by the plea of justification; and that plea having failed, for want of valid writs and valid levies, plaintiff was entitled to judgment.

In view of the authorities cited under the preceding assignments we submit the motion should have been granted.

In conclusion we submit that the judgment of the lower court must be reversed

1st. Because of error in the ruling of the court in admitting in evidence the judgment rolls in the cases of Powers Dry Goods Co. and the West Coast Grocery Co vs. Levy.

2d. For error of the court in admitting in evidence to the jury the testimony of Adsit, Schuck and Kendall tending to show fraud in the several transfers through which plaintiff obtained his title and possession of the goods in controversy.

3d. For error of the court in the instructions to the jury on the issue of fraudulent transfers.

4th. For error of the court in instructing the jury to find for defendant if in the transfers from Levy to Levine and from Levine to Kendall, the vendees as a part of the consideration for the goods assumed to pay

a debt of Levy to Marks, unless such assumption was in writing;

And the cause remanded to the U. S. District Court in and for the District of Alaska with instructions to grant a new trial.

W. W. Dudley
L. J. Michener

W. E. CREWS,

J. H. COBB,

Attys. for Antone Marks,

Plaintiff in Error.